IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 10-mj-01026-MJW

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JASON KAY,

Defendant.

RULE 11(c)(1)(A) and (B) PLEA AGREEMENT AND STATEMENT OF FACTS RELEVANT TO SENTENCING

The United States of America, by and through David M. Gaouette, United States Attorney for the District of Colorado, Jaime A. Pena, Assistant United States Attorney, and the defendant, Jason Kay, personally and by counsel, Paul McCormick, submit the following Plea Agreement and Statement of Facts Relevant to Sentencing pursuant to D.C.COLO.LCrR 11.1 and Fed. R. Crim. P. 11(c)(1)(A) and (B).

I. PLEA AGREEMENT

Defendant Jason Kay agrees to plead guilty to Count One of a Criminal Information charging a violation of Title 21 U.S.C. §331(k) (Adulteration and Removal of the Label of a Food While Held for Sale).

The defendant agrees to fully and truthfully cooperate with the Government and law enforcement authorities, which cooperation will include debriefings and testifying before a Court, jury, and/or Grand Jury whenever called upon or subpoenaed to do so by the Government.

The defendant agrees that if the Government can show that he intentionally lied or attempted to mislead the Government and/or law enforcement authorities, or if he intentionally does not fulfill the terms of, or does not complete, his cooperation under this agreement, then any information and testimony which he has given previously or hereafter in connection with this case can be used in any prosecution against him, notwithstanding the provisions set forth in this Plea Agreement.

This, of course, also means that the information and testimony will not be used against the defendant at sentencing pursuant to §1B1.8, if he continues to cooperate truthfully with the government. Information and testimony relating to involvement in crimes of violence, computer related crimes, or crimes involving minors, if any, are excluded from this agreement. "Crimes of violence," as the term is used here, refers to the traditional, Common Law meaning of the term.

The Government also agrees to move to dismiss without prejudice pending Criminal Complaint as to this defendant at the time of the execution of the Plea Agreement. Further, the District of Colorado will recommend that other Districts not prosecute Mr. Kay for conduct related to this case, of which the District of Colorado is aware at the time of the change of plea hearing.

Should defendant meet his obligations as set forth in this agreement, including providing truthful testimony whenever requested by the Government, the Government will recommend a probation sentence of 3 years; the Government may in its discretion file a motion, pursuant to U.S.S.G. § 5K1.1. The Defendant understands that any recommendation by the Government to the Court is merely a recommendation and the Court will exercise its discretion, within the law, in determining a just sentence. Should the Defendant substantially assist the Government and completely comply with this plea agreement, the Government, in its discretion, will recommend a sentence as low as a term of 3 years probation.

THE PARTIES UNDERSTAND THAT IF THE DEFENDANT INTENTIONALLY TESTIFIES FALSELY IN ANY DEBRIEFING OR PROCEEDING OR FAILS TO TESTIFY WHEN REQUESTED BY THE GOVERNMENT, THAT THIS AGREEMENT IS NULL AND VOID, THAT THE COURT MAY EXERCISE ITS DISCRETION IN DETERMINING THE APPROPRIATE SENTENCING COMPUTATIONS BASED ON ALL RELIABLE INFORMATION, INCLUDING DEBRIEFINGS, AND THAT THE GOVERNMENT MAY IN ITS DISCRETION SEEK TO RE-INSTATE PREVIOUSLY DISMISSED CHARGES.

II. ELEMENTS

The defendant is charged in Count One with a violation of 21 U.S.C. section 331(k).

This law makes it a crime to possess adulterate or remove the label of a food held for sale.

The Elements of the offense are as follows:

First: the defendant adulterated or removed the label of a food item while such article is held for sale;

Second: such act was after the article was shipped in interstate commerce;

Third: the act resulted in the article being misbranded.

The bottle of Gatorade drink constituted a "food" pursuant to 21 USC 321(f).

III. STATUTORY PENALTIES

The maximum statutory penalty for the violations of Title 21 U.S.C. § 331(d) (Count 1) is a term of imprisonment of not more than 1 year, not more than a $1,000 fine, or both, and $10 special assessment fee. There is no applicable statutory minimum sentence of imprisonment.

IV. STIPULATION OF FACTUAL BASIS AND FACTS RELEVANT TO SENTENCING

The parties agree that there is no dispute as to the material elements that establish a factual basis for the offense for conviction. Pertinent facts are set out below in order to provide a factual basis for the plea and to provide facts that the parties believe are relevant, pursuant to USSG § 1B1.3, for computing the appropriate guideline range. To the extent the parties disagree about the facts relevant to sentencing, the statement of facts identifies those facts known to be in dispute at the time of the plea. USSG § 6B1.4(b).

The statement of facts herein does not preclude either party from presenting or arguing, for sentencing purposes, additional facts or factors not included herein that are relevant to the guideline computation, USSG § 1B1.3, or to sentencing in general. USSG § 1B1.4. "[I]n determining the factual basis for the sentence, the Court will consider the stipulation [of the parties], together with the results of the presentence investigation, and any other relevant information." USSG § 6B1.4, comment.

The parties agree that the date on which conduct relevant to the offense (USSG § 1B1.3) began is in or about January 2010. The parties agree that the Government's evidence would be as follows:

1. Defendant made at least 11 separate purchases of various Gatorade products, a food within the meaning of 21 U.S.C. 321(f), from Safeway and King Soopers stores and removed the labels from those products. Defendant manufactured or produced labels for Gatorade A.M. Tropical-Mango flavored product and placed the labels on bottles that were not Gatorade A.M. Tropical-Mango flavored product but were, in fact, Gatorade Thirst Quencher Orange flavor.

Additionally, the Gatorade A.M. labels that defendant placed on the bottles of Gatorade Thirst Quencher Orange represented that the product contained Vitamin C when, in fact, Gatorade Thirst Quencher does not contain Vitamin C. The actions of the defendant caused the product to be misbranded within the meaning of Title 21, U.S.C. 343(a) in that their labeling was false or misleading in any particular.

2. Defendant returned to grocery stores in the Denver metro area and replaced the bottles affixed with false or misleading labels on store shelves for resale to the consumer.

3. At least one consumer purchased a bottle at King Soopers believing the product to be Gatorade A.M. Tropical-Mango flavor which was, in fact, Gatorade Thirst Quencher Orange flavor. The consumer registered complaints with King Soopers as well as PepsiCo North America and received remuneration.

4. According to PepsiCO, North America, the serial numbers on three of the recovered bottles indicate they were manufactured in New Jersey. One of the recovered bottles indicates it was manufactured in Texas. The bottles were shipped in interstate commerce for sale in Colorado.

V. SENTENCING COMPUTATION

The parties understand that the Court may impose any sentence, subject to the mandatory minimum sentence and up to the statutory maximum sentence, regardless of any Guideline range computed, and that the Court is not bound by any position of the parties. USSG § 6B1.4(d). The parties understand that the Sentencing Guidelines are advisory. The Court is free, pursuant to USSG §§ 6A1.3 and 6B1.4, to reach its own findings of facts and sentencing factors considering the parties' stipulations, the presentence investigation, and any other relevant information. USSG § 6B1.4 comment.; USSG § 1B1.4. To the extent the parties disagree about the sentencing factors, the

computations below identify the factors that are not in dispute. USSG § 6B1.4(b).

A. The base guideline provision applicable to these offenses is USSG § 2N2.1. Therefore the base offense level is 6.

B. There is no mitigating role adjustment. Therefore, pursuant to USSG §3B1.2(b), the resulting offense level remains 6.

C. Pursuant to USSG § 3E1.1(a), defendant has demonstrated acceptance of responsibility as to the offenses of conviction. A two-level downward adjustment results in an offense level of 4.

D. The parties understand that the defendant's criminal history computation is tentative. The criminal history category (CHC) is determined by the Court. At this stage, it appears that the defendant has no criminal history, resulting in a CHC of I.

E. The Guideline range resulting from the estimated offense level of 4, and the tentative CHC of I, is 0 to 6 months. However, in order to be as accurate as possible, with the CHC undetermined at this time, the estimated offense level of 4 could conceivably result in a range from 0 months (bottom of Category I with a base offense level of 4) to 12 months imprisonment (top of Category VI with a base offense level of 4).

G. Pursuant to USSG § 5E1.2 and 18 U.S.C § 3571(b), assuming an offense level of 4, the fine range for this offense is $250.00 to $1000.00 plus applicable interest and penalties.

H. Pursuant to 18 U.S.C. § 3561 , the Court may sentence this defendant to a term of up to 5 years probation, and may impose conditions it deems appropriate after applying the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3561.

VI. WHY THE PROPOSED PLEA DISPOSITION IS APPROPRIATE

The parties believe the sentencing range resulting from the proposed plea agreement is appropriate because all relevant conduct directly attributable to this defendant is disclosed, the sentencing guidelines and 18 USC 3553 permit the court to take into account all pertinent sentencing factors with respect to this defendant, and the charges to which the defendant has agreed to plead guilty adequately reflect the seriousness of the actual offense behavior.

This document states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings or assurances, express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions or assurances not expressly stated in this agreement.

Date: 2/9/10

Jason Kay
Defendant

Date: 2/9/10

Paul McCormick
Attorney for Defendant

Date: 2/9/10

Jaime A. Pena
Assistant U.S. Attorney